

**IN THE UNITED STATES BANKRUPTCY COURT**  
**FOR THE DISTRICT OF IDAHO**

<b>IN RE</b>	)	
	)	
<b>ROBERT SCOTT ASHBY,</b>	)	<b>Case No. 00-20022</b>
<b>dba Lewiston Wholesale Flowers and</b>	)	
<b>Ashby Land Floral, and</b>	)	
<b>MARY ANN ASHBY,</b>	)	
<b>fka Mary Ann Hollenbeck,</b>	)	<b>MEMORANDUM OF DECISION</b>
<b>fka Mary Ann Gregg,</b>	)	<b>AND ORDER</b>
<b>husband and wife,</b>	)	
	)	
<b>Debtors.</b>	)	
	)	
	)	
	)	

HONORABLE TERRY L. MYERS, UNITED STATES BANKRUPTCY JUDGE

Kenneth L. Anderson, Lewiston, Idaho for Debtors.

Robert L. Brower, JONES BROWER & CALLERY, Lewiston, Idaho for Margaret Burman.

C. Barry Zimmerman, Coeur d'Alene, Idaho, chapter 13 Trustee.

On April 19, 2000, several matters were heard by the Court pursuant to notice, including confirmation of the proposed chapter 13 plan of February 14, 2000 (the "Plan") filed by Robert and Mary Ann Ashby ("Debtors"). Creditor Margaret Burman ("Burman") objected to confirmation and, on March 27, 2000,

also moved to compel the Debtors to assume or reject a lease of nonresidential real property which is used in the business of Debtors.

Confirmation was continued for further hearing on May 31 in order that Debtors could address several deficiencies in the record identified by the standing chapter 13 Trustee. The Court took under advisement the issues related to the lease between Burman and the Debtors. This opinion constitutes the Court's findings of fact and conclusions of law in regard thereto. Rule 9014, 7052.

## **BACKGROUND**

This chapter 13 case was commenced by petition filed on January 10, 2000. The Debtors operate wholesale and retail nursery businesses under the style of Lewiston Wholesale Flowers and Ashby Land Floral. Certain of the business premises are leased from Burman, and Debtors' schedule G recognizes this as a lease of nonresidential real estate.<sup>1</sup>

The Plan, however, in its treatment of leases and executory contracts deals only with the Debtors' retail space lease with another creditor, Tidyman's. The treatment of Burman falls under the section of the Plan dealing with creditors holding long term secured claims, and provides that the claims of this, and several other creditors, will be paid "outside" the Plan directly by the Debtors in accord with prebankruptcy contract. The Plan asserts that the obligation to Burman is in the amount of \$600.00 per month,<sup>2</sup>

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<sup>1</sup> Schedule G identifies two other nonresidential real property leases as well.

<sup>2</sup> A copy of the 1997 lease agreement was attached as an exhibit to Burman's objection to confirmation. The asserted monthly rent is presently accurate, but is  
(continued...)

and identifies no other obligations owed Burman, either in the nature of prepetition defaults to be cured or in the nature of additional post-petition payments required.

At hearing, the Debtors conceded that the obligation with Burman is, in fact, a lease of nonresidential real property and not a long term secured debt. The Debtors contend, however, that their Plan's error in treatment is not seriously misleading and they have adequately indicated their intent to assume that lease. They also insist that the Plan, coupled with partial performance of their lease obligations post-petition, evidence their desire to assume this lease, and should be considered the equivalent of an express request to assume. Presumptively, the continuation of the lease is critical to their business operations and the success of their Plan.

Burman's March 9 objection to confirmation identified, well in advance of hearing, the Debtors' error in treating Burman as a secured creditor rather than a lessor, and the fact that the Plan neither purported to assume nor reject the lease. Burman asserted that, if the Debtors intended to assume the lease, the Plan failed to comply with § 365(b) in that it made no provision for the prompt cure of defaults or for adequate assurance of future performance. Finally, Burman argued that the Plan failed to address the maintenance of insurance on the leased premises, and at hearing the Debtors acknowledged that insurance had lapsed, and they were in the process of replacing coverage.

Burman's March 27 motion sought an order compelling the Debtors to assume or reject the lease and, if they wished to assume, asking for compliance with the requirements

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<sup>2</sup>(...continued)  
subject to a yearly escalation which is not addressed in the Plan.

of § 365(b). In this motion, Burman also asked for relief from the automatic stay based on the absence of insurance coverage, ongoing defaults, and the injuries suffered by reason of the delay in assumption. Finally, Burman's motion asks for an administrative expense priority claim for unpaid post-petition obligations accrued under the lease.

At hearing, the Court raised *sua sponte* the issue of the Debtors' lack of compliance with § 365(d)(4), which provides:

Notwithstanding paragraphs (1) and (2), in a case under any chapter of this title, if the trustee does not assume or reject an unexpired lease of nonresidential real property under which the debtor is the lessee within 60 days after the date of the order for relief, or within such additional time as the court, for cause, within such 60-day period, fixes, then such lease is deemed rejected, and the trustee shall immediately surrender such nonresidential real property to the lessor.

The Court also noted the operation of § 365(d)(3) which requires:

The trustee shall timely perform all the obligations of the debtor, except those specified in section 365(b)(2), arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected, notwithstanding section 503(b)(1) of this title. The court may extend, for cause, the time for performance of any such obligation that arises within 60 days after the date of the order for relief, but the time for performance shall not be extended beyond such 60-day period. This subsection shall not be deemed to affect the trustee's obligations under the provisions of subsection (b) or (f) of this section. Acceptance of any such performance does not constitute waiver or relinquishment of the lessor's rights under such lease or under this title.

The parties have filed post-hearing briefing to support their contentions and arguments regarding the existence and assumability of the lease.

## **DISCUSSION**

Under § 365(d)(4), the Debtors were obligated to assume Burman's lease before the expiration of 60 days from filing the petition (i.e., by March 10). If they did not, the lease would be deemed rejected and the Debtors required to immediately surrender the premises to the lessor. Any assumption of the unexpired lease is governed by § 365(b) and requires (i) actual cure or assurance of prompt cure of all defaults, (ii) compensation, or adequate assurance of prompt compensation, for actual pecuniary loss resulting from such default, and (iii) adequate assurance of future performance. § 365(b)(1)(A), (B) and (C). *Vanderpark Properties, Inc. v. Buchbinder (In re Windmill Farms, Inc.)*, 841 F.2d 1467, 1473 (9th Cir. 1988).

Ordinarily, assumption must be sought by motion, in part because § 365(a) requires Court approval for cause shown, and in part because such a request requires notice to the adverse party and opportunity to respond or object to the request thus implicating Rules 9014 and 9013. *See, Sea Harvest Corporation v. Riviera Land Company*, 868 F.2d 1077, 1079 (9th Cir. 1989).

The Debtors at no time sought by motion (whether within or without the Plan) to assume the lease with Burman. Nor did they ask by motion, before expiration of the initial 60 day period, for additional time within which to seek to assume this lease and to prove that they had or could comply with the several preconditions to assumption imposed by § 365(b)(1). *Willamette Waterfront, Ltd., v. Victoria Station Incorporated (In re Victoria Station Incorporated)*, 875 F.2d 1380, 1384-85 (9th Cir. 1989) (if lease cannot be timely assumed, a timely request for extension must be made).

Under the plain -- albeit strict -- language of the Code, the Burman lease was rejected effective March 10.

### **Assumption through the Plan**

The Debtors contend that § 1322(b)(7) and Rule 6006(a) recognize that lease assumption may occur through a plan as well as through the process of filing a specific motion and adjudicating a contested matter. There are decisions that validate such an approach. *See, In re Flugel*, 197 B.R. 92, 94-95 (Bankr. S.D. Cal. 1996); *In re Ford*, 159 B.R. 930, 931 (Bankr. W.D. Wa. 1993); *Riddle v. Aneiro (In re Aneiro)*, 72 B.R. 424 (Bankr. S.D. Cal. 1987).<sup>3</sup>

But the fact that a plan may request assumption or rejection approval does not alter or negate the other requirements of § 365, including the provisions of subdivisions (b), (d)(3) and (d)(4), which govern the matter. Even § 1322(b)(7) notes that a plan may provide for assumption or rejection “subject to section 365 of this title.” *See also, Flugel*, 197 B.R. at 94-95 (although motion not required when assumption is accomplished under a plan, debtor is not relieved of the requirements of § 365); *Ford*, 159 B.R. at 930. (Assumption in a plan requires expression of “a clear, unequivocal, affirmative intention to assume the . . . lease [and must set out] the minimal cure, compensation, and adequate assurance requirements of a motion to assume under § 365(b)(1)”).

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<sup>3</sup> This Court has recognized § 1322(b)(7) in a slightly different context. *In re Stellman*, 99.3 I.B.C.R. 111, 114 (Bankr. D. Idaho 1999) (rent-to-own contract’s assumption or rejection can be properly set forth in chapter 13 plan).

Here, however, the Plan of the Debtors did not purport to treat Burman as a lease creditor, nor did it state that the Debtors would assume her lease, nor did it allege or assert how the prerequisites for assumption of § 365(b) were to be met. These defects were identified as early as March 9, 2000, when Burman filed her objection to confirmation, but were not corrected by the Debtors.

The Debtor's place great reliance on *Elliott v. Four Seasons Properties (In re Frontier Properties, Inc.)*, 979 F.2d 1358 (9th Cir. 1992), believing it stands for the proposition that conduct which communicates an intention to assume is a satisfactory substitute for a motion to assume under § 365. However, *Frontier Properties* is readily distinguishable since there the critical conduct was the parties' stipulation to a methodology for dealing with the assumption of the lease, which process was approved by the bankruptcy court. The court's approval of the stipulation was found to constitute express approval of the assumption. 979 F.2d at 1365-66, (*also citing, In re Harris Management Co.*, 791 F.2d 1412 (9th Cir. 1986)). *Frontier Properties* does not support the argument of the Debtors that it is sufficient to merely make payments or communicate to the lessor (in pleadings or through extrajudicial act) a desire or intent to assume. That type of conduct is more akin to what was addressed in *Sea Harvest*, which rejected a debtor's argument that filing documents entitled "Affirmation and Assumption of Executory Contracts" was sufficient under § 365:

The documents entitled "Affirmation and Assumption of Executory Contracts" filed by Debtors did not constitute formal motions. These documents did not move the court to do anything; they simply

informed the court of the Debtors' intentions. The documents were not even entitled motions. Nor did these documents state any grounds for the assumption, let alone state grounds with particularity.

868 F.2d at 1079.<sup>4</sup> Even generously viewed, the Plan and the Debtors' conduct here amount to little more than a similar expression of intent.

The Court is sensitive to the consequences of this matter and that "because bankruptcy courts are courts of equity, they are compelled to disfavor a lease forfeiture that would imperil the debtor's reorganization and impede rehabilitative goals." *Victoria Station*, 875 F.2d at 1384, *quoting In re Victoria Station, Inc.*, 840 F.2d 682, 684 (9th Cir. 1988). Yet the Court of Appeals has also generally mandated that the "plain language" of the Code must be followed, and has specifically held:

We share the view of the district court, expressed in these proceedings, that "[s]trict compliance with these requirements avoids ad hoc inquiries into the meaning of the debtors' words and actions. Anything short of this standard risks uncertainty, which is exactly what Section 365(d)(4) was designed to remedy."

*Sea Harvest*, 868 F.2d at 1079.

Even assuming that a properly structured and detailed plan provision can stand in the stead of a motion for assumption, and even assuming that the filing of the plan within the first 60 days of the case is tacitly a request for an extension until confirmation of the

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<sup>4</sup> *Sea Harvest* also noted that Debtor's pleading failed to adequately address § 365(b)(1)(A) - (C): "Sea Harvest's empty declaration does not provide the compensation and assurances required by section 365(b)(1)." 868 F.2d at 1080. *Cf.*, *Flugel*, 197 B.R. at 93-94 (plan and accompanying notice had special provisions expressly providing for assumption of lease and addressing cure of defaults and maintenance of post-petition payments).



deadline for Court approval of the proposed assumption,<sup>5</sup> the suggested approach of the Debtors asks the Court to go too far. It would require interpreting the Plan as dealing with Burman under § 365, even though it did not, and then further interpreting that Plan as addressing the issues of cure of default, compensation, and adequate assurance, even though it did not. The Court concludes it would be improper to engage in such a wholesale reconstruction of the record.<sup>6</sup>

The Debtors also appear to ask the Court to use its equitable powers to interpret the Plan and their conduct in a manner which perpetuates the lease issues until assumption can be heard on the merits at a continued confirmation hearing. While there is a general preference for resolving matters on the merits, the Court may use its equitable powers only to effectuate, and not subvert or contradict, the express provisions of the Code. *See, American Hardwoods Inc. v. Deutsche Credit Corporation (In re American Hardwoods Inc.)*, 885 F.2d 621, 625 (9th Cir. 1989) (“While endowing the court with general equitable powers, section 105 does not authorize relief inconsistent with more specific law.”) *See also, Bear et al. v. Coben (In re Golden Plan of California, Inc.)*, 829 F.2d

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<sup>5</sup> *Flugel* found that, if a request for approval of assumption or for extension of the deadline is seasonably made, delay of the Court in ruling on that request is not necessarily fatal to the movant. But in that case, unlike here, an express request to assume was made in the plan. 197 B.R. at 95.

<sup>6</sup> It is true that Burman here did not seek not an order requiring immediate surrender under the deemed rejected language of § 365(d)(4). Rather, she sought a future deadline for assumption or rejection. *See, e.g.,* Rule 6006(b). That Burman failed to focus on the consequences of the Debtors’ lack of compliance with the statute does not mean that the Court is free to ignore it. That Burman might have been inferentially or directly aware of the Debtors’ desire to assume is not sufficient to toll or avoid the Debtors’ obligations under § 365(d)(4) or the consequences of their noncompliance.

705, 713 (9th Cir.1986) ("A bankruptcy court's equitable powers must be strictly confined within the prescribed limits of the Bankruptcy Act.") In fact, *Sea Harvest* specifically rejected such an appeal to the Court's § 105 equitable powers. 868 F.2d at 1080. Equity is not available to remedy the situation the Debtors have created.

This lease was rejected on or about March 10 by operation of law. The Court has been provided no persuasive, reasoned basis to support an alternative result.

## **CONCLUSION**

Under the statutory framework, case law and the record herein, the Court finds and concludes that the Debtors' nonresidential real property lease with Burman was not properly and timely assumed; that it is therefore deemed rejected; and that immediate surrender of the premises by the Debtors is mandated. For these reasons, and for the additional reason of lack of full post-petition performance of the Debtors' obligations under the lease, the Court finds and concludes that stay relief is appropriate under § 362(d)(1). Counsel for Burman shall submit an appropriate form of order granting stay relief.

Resolution of the foregoing matters makes it clear that the existing Plan cannot be confirmed. Confirmation is therefore denied, and the continued hearing scheduled for May 31 is vacated.

Burman's request for allowance of an administrative expense is not supported, on the present record, as to the exact amount claimed. For that reason, and because treatment of any administrative expense depends on the course of future events in this case, the request will be denied. Such denial is without prejudice.

Dated this 18th day of May, 2000.